

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PEDRO PIEDRA,
ALFONSO MELGAR, and
ERNESTO GUTIERREZ-ALEMAN,

Defendants.

No. CR04-4080-MWB

**REPORT AND RECOMMENDATION
ON MOTION TO SUPPRESS**

I. INTRODUCTION

This matter is before the court on the defendant Pedro Piedra's motion to suppress evidence. (Doc. No. 26) Pursuant to the trial scheduling order (Doc. No. 22), motions to suppress in this case were assigned to the undersigned United States Magistrate Judge for the issuance of a report and recommended disposition. Accordingly, the court held a hearing on the motion on December 8, 2004. Assistant United States Attorney John Lammers appeared on behalf of the Plaintiff (the "Government"). The defendant Pedro Piedra was present in person with his attorney, J.P. Greer.

The Government called the following witnesses at the hearing: Task Force Officer Tony Wingert, Task Force Officer Shawn Jensen, and South Sioux City Police Officer Chris Treadway. Piedra testified on his own behalf.

The following exhibits were admitted into evidence: Gov't Ex. 1, videotape of traffic stop of Piedra on 08/02/04; Def. Ex. 101, copy of Criminal Complaint (Doc. No. 1

in 04mj227); Def. Ex. 102, excerpts from transcript of preliminary examination and detention hearing held on August 6, 2004 (*see* Doc. No. 10 in 04mj227); Def. Ex. 103, map of a portion of South Sioux City, Nebraska; Def. Ex. 104, photograph of 512 W. 5th Street, South Sioux City, Nebraska; Def. Ex. 105, photograph of intersection of 6th Avenue and 5th Street, South Sioux City, Nebraska; Def. Ex. 106, photograph of intersection of 5th Avenue and 3rd Street, South Sioux City, Nebraska; Def. Ex. 107, photograph of 5th Avenue, South Sioux City, Nebraska, looking north; Def. Ex. 108, photograph of intersection of 5th Avenue and 5th Street, South Sioux City, Nebraska, looking south; Def. Ex. 109, defendant's copy of State of Nebraska Uniform Citation and Complaint, #1-04-2585, issued to Pedro Piedra on 08/02/04; Def. Ex. 110, Nebraska Code sections 60-4,128; 60-484; and 60-6,148; Def. Ex. 111, photograph of Ford Bronco (exterior); Def. Ex. 112, photograph of Ford Bronco (interior).

At the close of the hearing, the court permitted the parties to file supplemental briefs, if desired, by December 14, 2004. Neither party filed a supplemental brief. The court now finds the motion has been fully submitted, and turns to consideration of Piedra's motion to suppress.

II. BACKGROUND FACTS

Beginning in early July 2004, officers from the Tri-State Drug Task Force were investigating drug activities in South Sioux City, Nebraska ("South Sioux"). Specifically, the officers were focusing on the activities of an individual named Juan Pablo. Pablo was operating out of a residence located at 512 W. 5th Street in South Sioux.

On August 2, 2004, officers conducted a controlled buy of methamphetamine in South Sioux using a Confidential Informant (the "CI"). Pablo was arrested as a result of the controlled buy, and officers were looking for another individual, codefendant Ernesto

Gutierrez-Aleman (“Gutierrez”), who had been working with Pablo. The CI was making phone calls to Gutierrez for the purported reason of setting up another drug buy, but actually attempting to learn Gutierrez’s location. After numerous phone calls, Gutierrez still had not disclosed his location, and the officers finally sent the CI home at around 7:00 or 7:30 p.m.

That same day, several Task Force officers were conducting surveillance of the 5th Street residence and surrounding area. Officers had begun surveillance of the residence on July 12, 2004, and had made a controlled drug buy at the residence on July 22, 2004. On August 2, 2004, Task Force Officer Shawn Jensen and another officer had begun their surveillance of the residence in the early afternoon. They were in a surveillance vehicle that was parked forty to fifty yards west of the residence. Those officers had a direct line of sight to the residence, and they could tell when vehicles and people came and went to and from the residence. At about 7:30 p.m., Officer Jensen saw a Lincoln Navigator with Nebraska plates arrive at the residence. Officers were familiar with the Lincoln, which was owned by codefendant Alfonso Melgar. The Lincoln had been seen at the 5th Street residence on several occasions, and officers had made a traffic stop of the Lincoln earlier on August 2, 2004, but no drugs were found in the vehicle at that time.

Task Force Officer Tony Wingert was conducting surveillance in an area close to the 5th Street residence, but out of the direct line of sight of the residence. At about 8:00 p.m., the CI called Officer Wingert on his cell phone. The CI reported that Gutierrez had called the CI, asking if the CI had seen Pablo. Officer Wingert knew Pablo had been arrested and was in custody. The officer told the CI to tell Gutierrez that the CI had not seen Pablo, and then to ask if Gutierrez could get the CI some methamphetamine. The CI complied. Gutierrez said he was in Colorado, a fact Officer Wingert knew was untrue

because he had seen Gutierrez earlier that day, and officers had seen someone resembling Gutierrez going into the 5th Street residence.

Gutierrez told the CI he “had a guy” that he would contact to see if the guy could bring the methamphetamine and meet the CI at a park half a block away from the 5th Street residence. The CI and Gutierrez exchanged some phone calls, and the CI called and reported to Officer Wingert each time Gutierrez called. At around 9:30 p.m., the CI called Officer Wingert and reported that Gutierrez had just called again and the CI had talked with an English-speaking male who was with Gutierrez.¹ The CI believed the English-speaking male to be codefendant Melgar. The man told the CI they had reached “the guy,” and he was coming to meet the CI at the park with the drugs.² While Officer Wingert was on the phone receiving this information from the CI, he observed a grey Ford Bronco turn onto 5th Street in the direction of the residence under surveillance. Officer Wingert talked by radio with Officer Jensen, who picked up surveillance of the Bronco when it turned onto 5th Street. The officers observed the grey Bronco with Iowa license plates pull up and parked at 512 W. 5th Street. Melgar’s Lincoln was still parked at the residence, as well. From the time Officer Wingert started talking to the CI about the drugs being on their way, until the completion of that phone call, no other vehicles arrived at the 5th Street residence, and no one arrived at the residence on foot.

Officer Jensen could see two Hispanic males in the Bronco. Both of the Hispanic males got out of the Bronco and went into the 5th Street residence. A short time later, one

¹Gutierrez’s native language is Spanish, and he spoke only broken English.

²The court pointed out, and Officer Wingert agreed, that the criminal Complaint is unclear regarding these facts. The Complaint includes the following statement: “At approximately 9:30 p.m. the CS [aka the CI] called TFO Wingert and informed TFO Wingert that an English speaking individual had just called the CS and informed the CS that the individual had the methamphetamine.” Def. Ex. 101, p. 6.

Hispanic male came out of the residence, got into the Bronco, and drove away from the residence. Officer Jensen followed the Bronco. Officer Jensen knew the methamphetamine allegedly was supposed to be delivered at the park near the residence. The Bronco turned the other way, south, away from the park. However, Officer Jensen believed the vehicle contained drugs based on his experience and training, his knowledge that vehicles often come and go for short periods of time at drug houses, and his knowledge that the CI had just been informed the drugs were on their way. Officer Jensen stated every drug deal is different and things often change mid-stream. He theorized that many circumstances could have caused the Bronco's driver to proceed past the park without stopping; for example, he could have seen people or an unknown vehicle in the park, or seen headlights behind him.

Task Force officers had anticipated the possible need to make traffic stops of vehicles leaving the 5t Street residence, and Officer Treadway had been directed to patrol in the northwest corner of South Sioux so he would be available for that purpose. While Officer Jensen was following the Bronco, he called Officer Treadway and told him a grey Ford Bronco with Iowa plates had just left the 5th Street residence, which was a known drug location; subjects had left the area with drugs earlier that day; and Officer Jensen would like to have the Bronco stopped. Officer Treadway stated he had performed similar traffic stops in the past at the request of Task Force officers. He had experience working with Officer Jensen, who is a South Sioux City Police officer assigned to the Task Force. Officer Treadway stated that although Officer Jensen has more seniority than he does, Officer Jensen is not his supervisor, and Officer Treadway did not consider Officer Jensen's statement that he would like the Bronco stopped to be an order for him to stop the car.

Officer Treadway had proceeded a few blocks toward the area when he saw the Bronco and Jensen's vehicle cross in front of him on a cross street. Officer Treadway turned and followed. According to Officer Treadway, as he was pulling out to go around Officer Jensen's vehicle and overtake the Bronco, he saw the Bronco make a "rolling stop" at a stop sign, failing to come to a complete stop. Officer Treadway activated his emergency lights, which switched on his onboard camera.³ He stopped the Bronco, which was being driven by Piedra. As the officer approached the Bronco, he saw the driver turn and throw something into the floor behind the passenger seat. Officer Treadway spoke briefly with Piedra, who does not speak English well. Piedra presented a non-driver I.D. The officer said, "No licencia?" and Piedra nodded his agreement that he did not have a driver's license. Officer Treadway checked records and learned Piedra's Iowa license had been suspended indefinitely for nonpayment of a fine, and he had no valid Nebraska license.

Officer Treadway placed Piedra under arrest for driving without a license. He searched Piedra's person, and placed Piedra in the back of his patrol car. Another officer arrived at the scene a couple of minutes later. At some point, Piedra's car was searched, and methamphetamine was found in the vehicle. The 5th Street residence also was searched, and officers found a quantity of methamphetamine in the house. Gutierrez and Melgar were present at the residence during the search.

Officer Treadway testified he had planned to stop the Bronco in any event because he had a reasonable suspicion that the vehicle was involved in criminal activity. He knew there were officers conducting surveillance of the residence, which was a known location

³There is no sound on the videotape of the traffic stop. Officer Treadway explained the remote microphone that provides the sound recording is assigned to a patrol car, not to an officer, and sometimes an officer will take a microphone home inadvertently. He stated he did not have a microphone with him on this occasion presumably because the microphone had not been available when he started his shift.

of drug activities; they had seen the Bronco arrive, individuals exit the vehicle and enter the residence, and one individual come out after a few minutes; they had done a controlled buy at the residence previously; and Officer Jensen had told him the officers would like to have the vehicle stopped. He stated it was merely fortuitous that the Bronco happened to run the stop sign just when he was preparing to stop it anyway.

Piedra testified that he came to a complete stop at the stop sign. The court found Piedra's testimony to be credible in this regard, and finds Piedra did not commit a traffic violation that would have provided probable cause to stop the Bronco. However, that does not mean the stop was improper, as discussed below.

III. DISCUSSION

Piedra has moved to suppress all evidence arising from the stop of the Bronco. He argues (1) there was no traffic violation to give rise to a traffic stop; (2) the officers lacked "probable cause that this vehicle had been, or was then being used to, commit a crime"; and (3) even if "there was an objective reason for the initial 'stop sign' stop, the subsequent search of the vehicle and of Mr. Piedra was unreasonable and exceeded the scope of the stop sign and no driver[']s license tickets." (Doc. No. 26-1)

The Government argues the officers had probable cause to stop Piedra when he left the 5th Street residence, as well as probable cause to stop him when he committed a traffic violation.

"Any traffic violation, even a minor one, gives an officer probable cause to stop the violator." *United States v. Lyton*, 161 F.3d 1168, 1170 (8th Cir. 1998). However, in this case, the court has founds Piedra did not commit a traffic violation. Therefore, there was no probable cause to stop the vehicle on that basis.

However, the parties have missed the issue regarding the officers' stop of the vehicle. Both parties have submitted arguments regarding whether the officers had probable cause to stop the Bronco. The standard here is somewhat less than probable cause. As the United States Supreme Court explained in *United States v. Arvizu*, 534 U.S. 266, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002):

The Fourth Amendment prohibits “unreasonable searches and seizures” by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest. *Terry v. Ohio*, 392 U.S. 1, 9, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981). Because the “balance between the public interest and the individual’s right to personal security,” *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975), tilts in favor of a standard less than probable cause in such cases, the Fourth Amendment is satisfied if the officer’s action is supported by *reasonable suspicion to believe that criminal activity “may be afoot,”* *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989) (quoting *Terry*, *supra*, at 30, 88 S. Ct. 1868). *See also Cortez*, 449 U.S., at 417, 101 S. Ct. 690 (“An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity”).

Arvizu, 534 U.S. at 273, 122 S. Ct. at 750 (emphasis added).

The Eighth Circuit explained the standard further in *United States v. Ameling*, 328 F.3d 443 (8th Cir. 2003), as follows:

A reviewing court must “look at the ‘totality of the circumstances’ of each case to see whether the detaining officer has a ‘particularized and objective basis’ for suspecting legal wrongdoing.” [*Arvizu*, 534 U.S. at 273, 122 S. Ct. at 750.] In forming a basis for suspicion, officers may “draw on their

own experience and specialized training to make inferences from and deductions about the cumulative information available to them that ‘might well elude an untrained person.’” *Id.* (quoting *United States v. Cortex*, 449 U.S. 411, 418, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981)). While “an officer’s reliance on a mere hunch is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standards.” *Id.* at 274, 122 S. Ct. 744 (internal quotation marks and citation omitted).

Ameling, 328 F.3d at 447.

Based on the totality of the circumstances in the present case, the court finds the officers had a reasonable suspicion to believe the Bronco might be involved in criminal activity. Therefore, although the officers lacked probable cause, their reasonable suspicion, based on their experience, training, and the information at hand, supported an investigatory stop of the Bronco. Once the vehicle was stopped, Officer Treadway could arrest Piedra for driving without a valid license, which is a violation of Nebraska law. *See* Nebraska Code § 60-484.

The next question is whether, having stopped the Bronco and arrested Piedra for driving without a license, searches of Piedra’s person and the vehicle were permissible. A search of Piedra’s person clearly was permissible incident to his arrest. *See New York v. Belton*, 453 U.S. 454, 459, 101 S. Ct. 2860, 2863, 69 L. Ed. 2d 768 (1981) (“[I]n the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment.”).

In addition, “when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the

passenger compartment of that automobile.” *Belton*, 453 U.S. at 460, 101 S. Ct. at 2864. The *Belton* rule extends to a search of “the contents of any containers found within the passenger compartment.” *Id.*; *United States v. Barnes*, 374 F.3d 601, 603 (8th Cir. 2004) (citing *Belton*, *supra*).

In the present case, the evidence of record does not reveal the location in the vehicle where officers found the methamphetamine. It is reasonable to assume the drugs were located in the object Officer Treadway saw Piedra drop behind the vehicle’s passenger seat when he was stopped. Piedra has not argued the drugs were found in an area of the vehicle other than the passenger compartment, only that the officers lacked probable cause for any search whatsoever. The court finds the search of the Bronco was conducted properly incident to Piedra’s arrest for driving without a license.

Piedra also argues he has standing to challenge the stop and search of the vehicle, which was not owned by him but was being driven by him with the owner’s permission. (Doc. No. 26-1, p. 4) The Government takes no position on this argument in its brief, and the issue was not raised by either party at the hearing. No evidence was offered by either party regarding ownership of the vehicle, or Piedra’s permission to drive the vehicle. “[A] defendant must present at least some evidence of consent or permission from the lawful owner/renter to give rise to an objectively reasonable expectation of privacy.” *United States v. Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995) (citing *United States v. Gomez*, 16 F.3d 254, 256 (8th Cir. 1994)); *United States v. Rose*, 731 F.2d 1337, 1343 (8th Cir. 1984)).

Although no evidence was presented regarding ownership of the vehicle, Piedra asserted in his brief that the vehicle is owned by his companion of more than eleven years, Suzanne Vega, and he was driving the vehicle with her knowledge and permission. The court expects the evidence would be consistent with these representations. If Piedra had

Vega's permission to use the vehicle, then Piedra would have standing to challenge the search. *See United States v. Best*, 135 F.3d 1223, 1225 (8th Cir. 1998). *Cf. United States v. Ameling*, 328 F.3d 443, 446 n.3(8th Cir. 2003) (even a passenger has standing to challenge a stop and search).

Having found that Piedra is not entitled to relief on any of the theories he has advanced, the court finds his motion to suppress should be denied.

One other issue arose during the hearing that deserves brief discussion here. Piedra testified in his own behalf. His testimony was limited to specific matters. He stated he had worked at IBP for nearly fourteen years, until he was fired in the summer of 2004. He stated that on the day in question, he was stopped at around 10:00 p.m. and cited for failing to stop at a stop sign. He testified he came to a complete stop at the stop sign before proceeding. He recalled Officer Treadway coming up to his car. He also stated that when he first saw the emergency lights, they were about half a block behind him.

When the prosecutor began cross-examination, his first question to Piedra was whether Piedra was transporting methamphetamine to the 5th Street residence. Defense counsel objected on the basis that the question was outside the scope of direct examination. In response, the prosecutor argued the scope of inquiry was probable cause for the stop, not just the stop itself, and he should be permitted to inquire into all of the circumstances leading up to the stop.

The court sustained defense counsel's objection and prohibited the prosecutor from questioning Piedra beyond the scope of direct examination. The court invited the parties to brief the issue. Neither party has chosen to do so.

IV. CONCLUSION

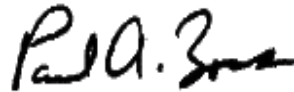
For the reasons discussed above, **IT IS RESPECTFULLY RECOMMENDED** that Piedra's motion to suppress be **denied**.

Any party who objects to this report and recommendation must serve and file specific, written objections by **December 22, 2004**. Any response to the objections must be served and filed by **December 30, 2004**.

If either party objects to this report and recommendation, that party must immediately order a transcript of all portions of the record the district court judge will need to rule on the objections.

IT IS SO ORDERED.

DATED this 15th day of December, 2004.

A handwritten signature in black ink, appearing to read "Paul A. Zoss", is written above a horizontal line.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT